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Is Lawrence v. Fox Again the Law of New York?

COMMENTS

IS LAWRENCE V. FOX AGAIN THE LAW OF NEW YORK?

It has been frequently stated in decisions[1] and has become generally accepted by text writers[2] that *Lawrence v. Fox*[3] intended to announce a broad general rule that any person, for whose direct benefit a contract was intended, could sue thereon. The purpose of this article is to trace the subsequent development of the rule on third party beneficiaries showing how the broad doctrine of the *Lawrence* case was soon restricted because of a fancied need for privity, and how gradually, though still paying lip service to this need, these restrictions were in their turn relaxed until the New York law has arrived at a state which provokes the question asked by the title of this paper.[4]

In *Lawrence v. Fox* one Holly lent Fox $300 on the agreement that Fox would pay that sum on the next day to Lawrence who was a creditor of Holly to the same amount. After default by Fox, Lawrence brought suit on this contract made for his benefit. In justifying a recovery by the plaintiff the court did not experience any difficulty with the fact that no consideration had proceeded from Lawrence, for it had already been settled that someone other than the obligee could supply the consideration.[5] A problem confronted the court, however, due to the fact that Lawrence was not a party to the contract between Holly and Fox; hence the ancient requisite of privity was lacking. The compelling justice of permitting Lawrence to recover on this contract, since he was directly and primarily intended to be benefited thereby, induced six members of the court to allow a recovery. Chief Judge Johnson, and Judge Denio, however, differed from the rest of the majority as to the reasons for this equitable result.[6] The majority overcame the lack of actual privity by

1. Seaver v. Ransom, 224 N. Y. 233, 240, 120 N. E. 639, 641 (1918); Gifford v. Corrigan, 117 N. Y. 257, 262, 22 N. E. 756, 757 (1889) wherein it was stated: "The prevailing opinion in that case [Lawrence v. Fox] rested the creditor's right upon the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract or its consideration." See also Wilson v. Costich Co., 231 App. Div. 346, 350, 247 N. Y. Supp. 131, 135 (4th Dep't 1931) *aff'd without opinion*, 256 N. Y. 629, 177 N. E. 169 (1931).

2. GRISMORE, CONTRACTS 395 (1947).

3. 20 N. Y. 268 (1859).

4. "The assault upon the citadel of privity is proceeding in these days apace. . . . In the field of the law of contract there has been a gradual widening of the doctrine of *Lawrence v. Fox* . . . until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy. . . ." Cardozo, C.J., in Ultramares Corp. v. Touche, 255 N. Y. 170, 180, 174 N. E. 441, 445 (1931).

5. Farley v. Cleveland, 4 Cow. 432 (N. Y. 1825), *in error*, 9 Cow. 639 (N. Y. 1827).

6. Johnson, C.J., and Denio, J., were of the opinion that the promise should be regarded as made to Lawrence through the medium of Holly as his agent, whose action he ratified when it came to his knowledge. Such agency, however, is an obvious fiction for in order that an agency result from ratification of another's act, such act must have been performed on behalf of the principal. TIFFANY, AGENCY § 48 (2d ed. 1924); see also 2 MECHEM, AGENCY 280 (2d ed. 1914) wherein it is stated: "Since the effect of ratification is to confirm the act as done, it is indispensible, in order to have an act of agency, that the

reasoning that since it was plainly the defendant's duty to pay Lawrence $300, in that he had promised Holly to do so and had received consideration from Holly for this promise, therefore the law would supply any privity that might technically be deemed necessary, by implying a promise *in law* from Fox to Lawrence to pay this sum.[7] The facts of this case do not indicate any conduct between Lawrence and Fox which would support an implied *in fact* promise to Lawrence to pay the $300. It is logical, therefore, to conclude that the manifest equity in permitting Lawrence to recover was the sole basis for this decision which the majority achieved by resorting to the fiction of a promise implied in law.[8]

To support the contention that *Lawrence v. Fox* intended to lay down the broad principle that any person for whose direct benefit a contract is made has a right of action thereon, we must consider the majority opinion as a whole. This principle is not contained in any single sentence or paragraph in the opinion but rather must be gleaned, first, from the decision itself, namely that Lawrence was permitted to recover on a contract made for his direct benefit although he was not privy to this agreement, and second, from the fact that the majority opinion quotes with favor this principle contained in several earlier decisions.[9]

Legal Duty Between Promisee and Beneficiary Required

Although Lawrence was a creditor beneficiary[10] of Fox, in that a legal duty,

act ratified must have been done by the assumed agent as agent in behalf of a principal. If the act was done by him as principal and on his own account, or on account of some third person, it cannot thus be ratified." In *Lawrence v. Fox,* Holly did not enter into the contract in question on behalf of Lawrence. The contract was made to benefit Lawrence but Holly did not presume to act for Lawrence; rather Holly entered into the contract as principal.

7. For an excellent discussion of the holding and effect of *Lawrence v. Fox* see, Ferson, *The Nature of Legal Transactions and Juristic Acts: Analysis of Common Factors and Variations,* 31 Cornell L. Q. 105, 157 (1945) and also, Ferson, The Rational Basis of Contracts and Related Problems in Legal Analysis 146 (1949).

8. As evidence of the contention that equity was the basis for this decision, witness the closing lines of the majority opinion: "No one can doubt that he (Fox) owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff . . . if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice." Lawrence v. Fox, 20 N. Y. 268, 275 (1859).

9. The *Lawrence* case quotes from Schemerhorn v. Vanderheyden, 1 Johns. 138, 140 (N. Y. 1806), "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise." Lawrence v. Fox also points out that the doctrine of the *Schemerhorn* case was approved and affirmed in Delaware and Hudson Canal Co. v. Westchester County Bank, 4 Denio 97, 98 (N. Y. 1847). Further the headnote in the *Lawrence* case embodies the broad doctrine under discussion; it states: "An action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration."

10. Selections from Williston on Contracts § 356 (1938) divided third party bene-

i.e., a $300 debt was owed by Fox to Lawrence, the court did not even suggest that the existence of such a duty was a prerequisite to a right of action by the beneficiary. Eighteen years later, however, the case of *Vrooman v. Turner*[11] attempted to limit recovery to creditor beneficiaries. While admitting that it was not essential to have actual privity between the promisor and beneficiary to give the latter a right of action on a promise made for his benefit,[12] this decision did require "first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."[13] The court was of the opinion that a legal duty, owed by the promisee to the beneficiary would so connect the latter to the transaction as to be a substitute for any privity with the promisor. The exact legal basis for such a privity by substitution has never been clear. Refusal to depart wholly from the requisite of privity between promisor and beneficiary led the court to invent the concept of a privity by substitution and shackled the courts of this state with the rule that a legal duty must be owing between the promisee and the beneficiary before the latter could be allowed a recovery on the promise.

RETURN TO RULE OF LAWRENCE V. FOX BEGINS: MORAL DUTY SUFFICES

The New York courts have been struggling to free themselves from the artificial limitation that some legal duty or obligation must exist between promisee and beneficiary ever since the *Vrooman* case. The first modification of this limitation was accomplished in *Todd v. Weber*[14] wherein the plaintiff, an illegitimate daughter of the defendant, was permitted to recover on a promise made by the defendant to other relatives of the plaintiff that he would remember her in his will. Although this decision did not mention either the *Lawrence* or the *Vrooman* cases, yet it quotes favorably the broad language of *Schemerhorn v. Vanderheyden* relied on in the *Lawrence* case.[15] Then came

ficiaries into three classes: 1.—A person is a donee beneficiary if the purpose of the promisee in obtaining the promise of all or part of the performance thereof, is to make a gift to the beneficiary, or to confer upon him a right against the promisor to some performance neither due (nor supposed) or asserted to be due from the promisee to the beneficiary, 2.—A person is a creditor beneficiary if no intention to make a gift appears from the terms of the promise, and performance of the promise will satisfy an actual (or supposed) or assented duty of the promisee to the beneficiary, 3.—A person is an incidental beneficiary if the benefits to him are merely incidental to the performance of the promise. See also, RESTATEMENT, CONTRACTS § 133 (1932).

11. 69 N. Y. 280 (1877).

12. *Id.* at 284: "It is true there need be no privity between the promissor and the party claiming the benefit of the undertaking. . . ."

13. *Id.* at 284.

14. 95 N. Y. 181 (1884).

15. *Id.* at 194 contains the quote from the *Schemerhorn* case set out in note 9 *supra*. In reaching its decision the *Todd* case relied heavily upon the early English case of Dutton v. Poole, 2 Lev. 210, 83 Eng. Rep. 523 (K. B. 1677).

Buchanan v. Tilden,[16] where the plaintiff, a donee beneficiary, was permitted to recover on a promise made by the defendant to plaintiff's husband to give her a sum of money in return for services performed by the husband. This decision proceeded on the ground of a husband's moral and legal obligation to provide for his wife, and paved the way for a series of cases wherein a moral duty arising out of a family relationship was the basis for allowing the one intended to be benefited by the contract to sue thereon. Thus the moral duty of a fiancee to his affianced wife,[17] a mother's duty to her child,[18] the duty owing between brothers,[19] and in *Seaver v. Ransom*,[20] the duty of an aunt to her niece, have all been held sufficient to entitle the intended beneficiary of a contract to recover thereon. As pointed out in the *Seaver* case, these decisions were made in a desire to do justice rather than to apply with strict accuracy rules calling for the existence of a legal duty or obligation.[21] The recent case of *Lewin v. Excelsior Exterminating & Mfg. Co.*[22] suggests a more unique basis for permitting a donee beneficiary to sue, namely the fact that the beneficiary was the sister of the *promisor*. No explanation was tendered, however, as to why such a relationship between the promisor and the beneficiary should entitle a beneficiary to sue.

Moral Duty Between Municipality and Resident Suffices

The gap in the rule requiring a legal duty owing from the promisee to beneficiary has been widened further by the "public contract" cases. In the early case of *Little v. Banks*,[23] the defendant had contracted with the state to sell law reports to the public, and in the event of a failure to supply such reports, it undertook to pay to any injured party stipulated liquidated damages. A person to whom the defendant had failed to supply these reports was

16. 158 N. Y. 109, 52 N. E. 724 (1899).

17. De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807 (1917).

18. Weinberger v. Van Hessen, 260 N. Y. 294, 183 N. E. 429 (1932).

19. Stone v. S. Klein on the Square, 73 N. Y. S. 2d 135 (City Ct. 1947).

20. 224 N. Y. 233, 120 N. E. 639 (1918). This case also stated that the right of a third party beneficiary to sue is limited to four classes of cases: 1.—Where third party is a creditor beneficiary, 2.—Family relationship cases, 3.—Public contract cases, and, 4.—Cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration. As stated in First Nat. Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 39 N. E. 331 (1895) the doctrine of *Lawrence v. Fox* is really not involved in this fourth class of cases for this doctrine applies only when there has been no express promise made to the beneficiary. When a promise is made directly to the beneficiary his right of action on the promise is clear since he is a party to the promise and it is immaterial that the consideration for the promise was supplied by a third party. See Farley v. Cleveland, 4 Cow. 432 (N. Y. 1825), *in error*, 9 Cow. 639 (N. Y. 1827).

21. 224 N. Y. 233, 240, 120 N. E. 639, 641 (1918).

22. 72 N. Y. S. 2d 638 (Sup. Ct. 1947). It should be noted that in Todd v. Weber, 95 N. Y. 181 (1884) the moral obligation also existed between the promisor and beneficiary and yet it is not cited in the *Lewin* case.

23. 67 Hun. 505, 22 N. Y. Supp. 512 (Sup. Ct. 1893).

permitted to recover on the contract. It should be noted that the rule of *Lawrence v. Fox* was not relied on in reaching this result; rather the basis of the decision was stated to be a broad principle of public policy. Subsequent cases, however, based the right of an inhabitant of a municipality to recover on contracts for the direct benefit of its inhabitants on "municipal paternalism, upon a recognized obligation of the municipality to represent its citizens in making contracts involving their welfare . . . to an extent such that a direct right of action at law accrues to an individual citizen upon breach of the contract."[24]

Whether an individual resident has a right of action on the contract with the municipality under the test laid down in *Moch Co. v. Rensselear Water Co.*[25] depends on whether the contract is intended to benefit him directly and primarily, "in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost," in which case he can sue; or merely to benefit him incidentally and secondarily, without the assumption of such a duty, in which case he cannot. Thus, the right of a property owner to maintain an action against a water company for failure to supply sufficient water for fire purposes, as required by a contract with the municipality, was denied in the *Moch* case. The contract of the water company was an assumption of a duty to the city, not its inhabitants. While it is true that the individual residents would be benefited by the faithful performance of this contract, yet this contract did not contemplate that the water company should be answerable to these individual residents. On the other hand in *Pond v. New Rochelle Water Co.*,[26] a contract between a municipal corporation and a water company fixing the rate at which customers would be supplied, was held to have been intended to benefit the individual customers directly, and an individual resident was therefore permitted to enjoin collection of a rate higher than the contract rate. This case was decided prior to the *Moch* case and does not mention the assumption of a duty to make reparation to individual residents in the event that benefit is lost as a prerequisite to an action by such residents. However, the benefit to individual residents was so direct here as to bespeak the assumption of such a duty and the result of the case would be the same under the test set forth in the *Moch* case. Further, a resident customer has

24. Wilson v. Costich Co., 231 App. Div. 346, 348, 247 N. Y. Supp. 131, 133 (4th Dep't 1931) *aff'd without opinion*, 256 N. Y. 629, 177 N. E. 169 (1931). See also, Lewis v. Dunbar & Sullivan Dredging Co., 178 Misc. 980, 36 N. Y. S. 2d 897 (Sup. Ct. 1942).

25. 247 N. Y. 160, 159 N. E. 896 (1928). See also, Steitz v. City of Beacon, 295 N. Y. 51, 64 N. E. 2d 704 (1945); Prescott v. Collins, 263 App. Div. 690, 693, 35 N. Y. S. 2d 135, 138 (3d Dep't 1942) wherein it was stated: "Something more must then appear than an intention that the promise shall redound to the benefit of the public or to that of a class of indefinite extension. The promise must be such as to 'bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost.'"

26. 183 N. Y. 330, 76 N. E. 211 (1906). *Accord*, Farnsworth v. Boro Oil & Gas Co., 216 N. Y. 40, 109 N. E. 860 (1915), *cf.* Smyth v. City of New York, 203 N. Y. 106, 96 N. E. 409 (1911).

been permitted to compel the water company to furnish water at the contract rate by mandamus proceedings.[27]

VROOMAN V. TURNER STRICTLY APPLIED IN MORTGAGE TRANSACTIONS

A typical situation for the application of the *Lawrence v. Fox* doctrine frequently occurs in mortgage transactions when the mortgagor transfers to another his interest in the mortgaged premises and this grantee assumes the mortgage and agrees to pay the mortgage debt. The question then arises whether, in the event of a deficiency at foreclosure, the mortgagee can bring an action against the grantee of the equity of redemption on his agreement to pay the mortgage.[28] In *Thorp v. Keokuk Coal Co.*,[29] which was decided prior to *Vrooman v. Turner,* the mortgagor was himself personally liable for any deficiency at foreclosure and the mortgagee was permitted to recover against a grantee of the mortgagor who assumed the mortgage debt. The court reasoned simply that since this agreement to assume the mortgage debt was made for the benefit of the mortgagee he should recover thereon and it was stated in a *dictum* that it would have made no difference had the mortgagor not been personally liable. *Vrooman v. Turner*,[30] however, involved a situation where one Sanborn, a sub-grantee of the original mortgagor, was not personally liable for the mortgage debt itself although the land was subject to the mortgage lien. The mortgagee was denied a right of action against the grantee of Sanborn who had assumed the mortgage debt on the ground that there was no duty or obligation owing from Sanborn to the mortgagee. Since that decision, it has remained the law in New York that in order for a mortgagee to sue on an agreement between the mortgagor and his grantee, the latter must have assumed the mortgage debt.[31] It should be noted that where the grantee who assumes the mortgage is not a simple grantee but actually a second mortgagee, then even though the mortgagor is personally liable on the first mortgage, a right of action will be denied the first mortgagee on this assumption by the second mortagee. Faced with this situation, the court reasoned in *Garnsey v. Rogers*,[32] that the covenant of the grantee was, in legal effect, a covenant to make advances for the benefit of his grantor on the

27. Matter of Baker v. Interurban Water Co., 113 Misc. 459, 184 N. Y. Supp. 833 (Sup. Ct. 1920).

28. For an extensive discussion of this problem, see 2 GLENN, MORTGAGES 1174-1185 (1943).

29. 48 N. Y. 253 (1872). In Burr v. Beers, 24 N. Y. 178 (1861) the mortgagee's right to recover under similar facts against a grantee who assumed the mortgage, was said not to be based on the notion of a direct contract between the grantee and the mortgagor, but on the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. For a criticism of the application of the subrogation rule to such cases, see 2 GLENN, MORTGAGES 1178 (1943).

30. See note 11 *supra*. *Cf.* Cashman v. Henry, 75 N. Y. 103 (1878).

31. Wagner v. Link, 150 N. Y. 549, 44 N. E. 1103 (1896). See also, 2 JONES, MORTGAGES 324 (8th ed. 1928).

32. 47 N. Y. 233 (1872). This case is criticized in Pardee v. Treat, 82 N. Y. 385 (1880).

security of the land, hence it was not a promise made for the benefit of the first mortgagee, although he might incidentally have been benefited by its performance.

Thus it appears that the requirement of a duty or obligation between promisee and beneficiary has not been relaxed in mortgage cases although the broad language in *Onondaga County Sav. Bank v. Markson Bros.*[33] indicates a desire to do away with such a limitation even in this class of cases.

A Mere Shadow of a Relationship Suffices

The assault upon the rule that some duty must be owing from the promisee to the beneficiary has been proceeding in other groups of cases besides the "family relationship" and "public contracts" cases. Thus in *McClare v. Mass. Bonding & Ins. Co.*,[34] wherein a compensated surety had issued a bond to an athletic club as required by the state athletic commission to secure a class of creditors to which the plaintiff belonged, the plaintiff was allowed to recover thereon and it was held to be immaterial that the commission may have exceeded its powers in exacting the bond. In reaching its decision the court stated: "The requirement of some obligation or duty running from the promisee to the third party beneficiary has been progressively relaxed until a mere shadow of the relationship suffices, if indeed it has not reached the vanishing point."[35]

Three recent decisions are illustrative of the trend towards the broad doctrine intended by *Lawrence v. Fox*. In *Kadish v. N. Y. Evening Journal*,[36] a contract between the defendant and the newspaper guild was held to have been made for the benefit of the plaintiff as a member of that guild and he was permitted to sue thereon for a wrongful discharge. In *Motzkin Bros. Cleaners & Dyers v. Dime*,[37] the defendant had contracted with Motzbro Corp. not to solicit customers of either the Motzbro Corp. or the plaintiff for three years and the plaintiff was permitted to enforce this contract. Both of these cases relied exclusively on *Lawrence v. Fox* for their decision and neither made mention of any requisite of a duty or obligation. Concededly in the *Kadish* case it is possible to spell out a duty owing by the guild to plaintiff, as one of its members, to contract for his benefit, but even had the case

33. 182 Misc. 954, 52 N. Y. S. 2d 148 (County Ct. 1941).

34. 266 N. Y. 371, 195 N. E. 15 (1935).

35. *Id.* at 379, 195 N. E. at 17. One of the most liberal decisions in favor of permitting a third party to sue on a contract made for his benefit is Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922), but this case involved a consideration not pertinent here.

36. 67 N. Y. S. 2d 435 (Sup. Ct. 1946). In Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914) a member of a labor union was permitted to recover on a contract made for his benefit by the labor union with his employer. The basis for this decision was simply that the plaintiff was intended to be directly benefited by this contract, and was connected to the consideration by virtue of the union dues he had paid. It appears far-fetched to reason that by payment of dues the plaintiff was connected with the consideration merely because such dues helped to give the union the strength required to bargain with this employer.

37. 81 N. Y. S. 2d 625 (Sup. Ct. 1948).

been decided on this ground, it would represent a great departure from the legal duty demanded by the *Vrooman* case. In the *Motzkin* case, as the facts are stated no duty between the promisee and beneficiary appears.

Filardo v. Foley Bros.[38] warrants consideration not so much on its result since it can be considered as an extension of the "public contract" cases, but rather because of its broad language. In this case the defendant agreed with the United States to do work in the Near East and to obey all applicable laws of the United States. The plaintiff who had worked for the defendant in the Near East was permitted to recover unpaid overtime pay guaranteed by the Eight Hour Law. During the course of its decision the court stated that quite apart from any cause of action given by statute, the plaintiff had a right to recover on the basis of a contract between the defendant and the Federal Government: "By 'principles of general contract law' . . . as well as by the law of New York, suit on a contract may be maintained by a third party beneficiary."[39]

Rationale Behind Privity Requirement

It has been stated that: "A promise as a form of juristic act, *i.e.*, an act indicating consent to assume an obligation, should not require privity any more than the act of transferring property requires privity."[40] The reluctance of the courts to abandon this requisite of privity and to dispense completely with the limitation of a duty between promisee and beneficiary as a substitute for it, may be explained by the difficulties involved in drawing a satisfactory line between those beneficiaries who should be protected and those who should not.[41] This difficulty is brought into sharp focus when we consider the test generally applied to determine the right of both donee and creditor beneficiaries to sue; namely, that for a third party to sue he must be a person to whom the contracting parties intended the promisor's performance to run.[42] Aside from the evidential difficulties involved whenever intent is made the test of a person's rights, this test seems to be accurate in the donee beneficiary cases. In the creditor beneficiary cases however, the intent of the promisee is obviously to benefit himself by obtaining satisfaction of a debt which he owes to

38. 297 N. Y. 217, 78 N. E. 2d 480 (1948) *rev'd on other grounds*, 336 U. S. 281 (1949). It is fair to add that in the lower courts of New York there appears, at times, a reluctance to abandon the requisite of a duty or obligation between promisee and beneficiary. Such reluctance is evidenced by the recent case of Hirt v. Miceli Bros. Construction Co., 80 N. Y. S. 2d 798 (City Ct. 1948).

39. 297 N. Y. 217, 225, 78 N. E. 2d 480, 484 (1948).

40. Ferson, *supra* note 7 at 156. It was also stated (at 155): "Other kinds of transactions can be made in favor of a person who is not a party to the transaction. Property can be so transferred. Trusts can be so declared, and from early time, the action of debt would lie at the suit of a beneficiary if money had been given to a third person for his benefit. Why should a third person not recover on a contract wherein he has been designated as obligee?"

41. Grismore, Contracts 399 (1947).

42. Durnherr v. Rau, 135 N. Y. 219, 222, 32 N. E. 49, 50 (1892); Simpson v. Brown, 68 N. Y. 355, 361 (1877).

the third party, but the promisor's performance is intended to run to the beneficiary also.[43]

CONCLUSION

It can be stated with certainty that the law in New York has reached a state where even a donee beneficiary can recover on a contract intended for his direct benefit if there is any sort of a "moral duty" owing to him from the promisee. Further, as evidenced by the *McClare*[44] and *Kadish*[45] cases, the type of moral duty which will suffice has been extended beyond that present in the "family relationship" and "public contract" cases. Indeed, it would appear that a third party will be given a right of action on a contract made for his benefit whenever there is any recognized relationship between the beneficiary and the promisee which gives rise to a moral obligation on the part of the latter to look out for the best interests of the former.

May a third party beneficiary to whom there is owing no duty or obligation, legal or moral, from the promisee enforce a contract made for his benefit? There is no decision in New York which would expressly give such a beneficiary a cause of action. The tendency is, it seems clear, to base a third party's right to sue solely on the ground that he was intended to receive a direct benefit from the contract, without even mentioning the existence of any duty or obligation. Such decisions rely exclusively on *Lawrence v. Fox* and indicate that the judicial mind is ripe for a return to that broad doctrine in its entirety.

43. For an exhaustive treatment of this problem see 2 WILLISTON, CONTRACTS § 356, 356A (Rev. ed. 1936). It is stated (at 1046) that: "Any attempt to reduce to a single governing principle the case of the donee beneficiary and that of the creditor beneficiary is not only doomed to failure but is an inevitable source of confusion."

44. See note 34 *supra*.

45. See note 36 *supra*.